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FEDERAL TRADE COMMISSION

16 CFR Part 23

Guides for the Jewelry, Precious Metals, and Pewter Industries

AGENCY: Federal Trade Commission (“FTC” or “Commission”).

ACTION: Final Guides Amendments.

SUMMARY: The Commission announces revisions in the FTC's Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 CFR part 23. The amendments in particular provide guidance on how to mark and describe non-deceptively an alloy of platinum and non-precious metals, consisting of at least 500 parts per thousand, but less than 850 parts per thousand, pure platinum and less than 950 parts per thousand total platinum group metals.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION: Pursuant to public comments and consumer survey evidence submitted in response to two Federal Register Notices, the FTC amends the Platinum Group Metals Section (hereinafter “Platinum Section”) of the Commission's Guides for the Jewelry, Precious Metals, and Pewter Industries (“Jewelry Guides” or “Guides”), 16 CFR 23.7, and also amends the Scope and Application Section of the Guides, 16 CFR 23.0. The amendments to the Platinum Section provide that marketers may non-deceptively mark and describe “platinum/base metal alloys,” those containing at least 500 parts per thousand (“ppt”), but less than 850 ppt, pure

platinum and less than 950 ppt total platinum group metals (“PGM”) as “platinum” using certain disclosures.¹ In supporting this conclusion, the following Federal Register Notice provides background information; summarizes the record established by the public comments; analyzes this record based on the applicable Commission standard; and sets forth the text of the amendments to the Platinum Section and to the Scope and Application Section of the Guides.

I. Background

A. The Platinum Section of the Jewelry Guides

The Commission issued the Jewelry Guides to help marketers avoid making jewelry claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. Industry guides, such as these, are administrative interpretations of the law. Therefore, they do not have the force of law and are not independently enforceable. The Commission can take action under the FTC Act, however, if a business makes marketing claims inconsistent with the Guides. In any such enforcement action, the Commission must prove that the act or practice at issue is unfair or deceptive in violation of Section 5 of the FTC Act.²

To help marketers avoid unfair or deceptive acts or practices in connection with the sale of platinum, the Platinum Section contains a general statement regarding the deceptive use of the term “platinum” (and the names of other PGM) and provides examples of potentially misleading and non-violative uses of the term “platinum.”³ Specifically, Section 7(a) states:

¹ The Platinum Group Metals are platinum, iridium, palladium, ruthenium, rhodium, and osmium. 16 CFR 23.7(a).

² The Commission is adding two new paragraphs to Section 23.0 to clarify the scope and application of the Jewelry Guides. This does not represent a change in Commission law or policy.

³ On April 8, 1997 (62 FR 16669), the Commission published the current Platinum Section. The Commission revised this section as part of its most recent comprehensive review of the

It is unfair or deceptive to use the words “platinum,” “iridium,” “palladium,” “ruthenium,” “rhodium,” and “osmium,” or any abbreviation to mark or describe all or part of an industry product if such marking or description misrepresents the product’s true composition.⁴

Section 7(b) provides three examples of markings or descriptions for products containing platinum that may be misleading.⁵ Section 7(c) provides four examples not considered unfair or deceptive.

B. Procedural History

On December 15, 2004, Karat Platinum, a jewelry manufacturer, requested an FTC staff opinion regarding the application of the Platinum Section to a new product consisting of 585 ppt platinum and 415 ppt copper and cobalt (non-precious metals). The request stated that the company believed that the Platinum Section did not prohibit marking or describing the product as “platinum,” or address how to mark or describe the product other than to prohibit misrepresentations. The staff responded on February 2, 2005, agreeing that the Guides did not address the marketing of this product, and providing guidance.⁶

Guides.

⁴ 16 CFR 23.7(a).

⁵ These examples provide that it may be misleading: (1) to describe a product with less than 950 ppt pure platinum as “platinum” without qualification; (2) to describe a product with less than 850 ppt, but more than 500 ppt, pure platinum as “platinum” without qualifying the representation with a disclosure identifying the ppt of pure platinum and the ppt of other platinum group metals contained in the product; (3) to use the word “platinum” or any abbreviation to mark or describe any product that contains less than 500 ppt pure platinum. 16 CFR 23.7(b).

⁶ The request for a staff opinion and the staff’s response to that request are located at www.ftc.gov/os/statutes/jewelry/letters/karatplatinum.pdf and www.ftc.gov/os/statutes/jewelry/letters/karatplatinum002.pdf, respectively. The staff letter stated that “this alloy [is] sufficiently different in composition from products consisting of platinum and other PGM as to require clear and conspicuous disclosure of the differences.” The staff letter also explained that it did not appear “that simple stamping of the jewelry’s content (e.g., 585 Plat., 0 PGM) would be sufficient to alert consumers to the differences between the Karat Platinum alloy and platinum products containing other PGM.”

Because of the public interest in this issue, the Commission published a Federal Register Notice (“2005 FRN”)⁷ soliciting public comment regarding whether it should revise the Guides to address this new product. The Commission also sought comment regarding whether the Guides should address how to mark or describe non-deceptively platinum-clad, filled, coated, or overlay jewelry products.

Based on the 2005 FRN comments and consumer survey evidence, the Commission issued a Federal Register Notice in 2008 (“2008 FRN”) soliciting comment on a proposed amendment to the Platinum Section to address these issues. Prior to the close of the comment period on May 27, 2008, the Platinum Guild International (“PGI”) and the Jewelers’ Vigilance Committee (“JVC”) requested a 90-day extension. The Commission extended the comment period until August 25, 2008.⁸

C. The 2005 FRN Comments

The vast majority of the 62 responsive comments⁹ recommended that the Commission revise the Platinum Section to include guidance for platinum/base metal alloy jewelry. These commenters further recommended that the Commission provide that marking or describing platinum/base metal alloy jewelry as “platinum” is deceptive. The commenters asserted that platinum jewelry has always been produced as nearly pure or combined with other PGM (hereafter

⁷ 70 FR 38834 (July 6, 2005).

⁸ 73 FR 22848 (Apr. 28, 2008).

⁹ The Commission’s summary and analysis of the 2005 FRN comments is detailed in the 2008 FRN, 73 FR 10190 (Feb. 26, 2008). The 62 comments to the 2005 FRN are posted at: <http://www.ftc.gov/os/comments/jewelryplatinum/index.shtm>.

“platinum/PGM”),¹⁰ and that platinum/base metal alloys do not share the same characteristics as these products.¹¹ Karat Platinum disagreed that the use of the term “platinum” to describe platinum/base metal alloys is deceptive.

The 2005 record included consumer perception studies and product testing. PGI submitted a study it commissioned from Dr. Thomas J. Maronick, (“2005 Platinum Awareness Study”),¹² a 2003 marketing survey conducted by Hall & Partners,¹³ and two tests evaluating platinum/base metal alloys.¹⁴ The 2005 Platinum Awareness Study found that 39.5% of consumers believe that products marked or described as “platinum” are pure or nearly pure and that certain qualities or attributes typically associated with platinum are important to a substantial number of consumers.¹⁵ The study also found that a majority of consumers would not expect platinum/base metal alloys containing more than 40% base metal to be called “platinum” if they do not possess the attributes present in higher purity platinum or platinum/other PGM products.¹⁶ In addition, the study showed that the majority of consumers do not fully understand numeric jewelry markings, particularly those

¹⁰ Currently the Guides specifically address the marketing of products containing: (1) at least 85% platinum; or (2) at least 50% and less than 85% platinum, and at least 95% total PGM.

¹¹ See, e.g., JVC Comment 2005 at 4, 7-8; PGI Comment 2005 at 16-19.

¹² PGI Comment 2005, Attachment A. The Maronick study title is “Platinum Awareness Study: An Empirical Analysis of Consumers’ Perceptions of Platinum as an Option in Engagement Ring Settings.”

¹³ Id., Attachment B.

¹⁴ Id. at 3, and Attachments C and D.

¹⁵ Id., Attachment A. These attributes included the product’s weight, durability, scratch and tarnish resistance, and whether it was hypoallergenic and could be resized.

¹⁶ Higher purity platinum or platinum/other PGM products include those containing at least 850 ppt platinum, or at least 500 ppt platinum and at least 950 ppt PGM.

using chemical abbreviations, such as 585 Pt./415 Co.Cu. The PGI product tests indicated that certain platinum/base metal alloys are inferior to higher purity platinum jewelry in terms of wear and oxidation resistance, as well as weight loss, and that they cannot be resized using certain procedures.¹⁷ Karat Platinum submitted a test of its alloy which suggested that the alloy is superior or equivalent to higher purity platinum jewelry in several respects, but is less dense than higher purity platinum jewelry. Karat Platinum did not test whether its alloy is hypoallergenic.

Several comments also suggested that the Commission provide guidance on how to describe platinum-clad, filled, plated, or overlay products, but most did not discuss what guidance the Commission should provide.

II. The 2008 FRN and Comments

A. The 2008 FRN

Based on the 2005 FRN record, the Commission issued a 2008 FRN soliciting comment on a proposed revision to the Platinum Section to address the marketing of platinum/base metal alloys.¹⁸ The Commission explained that the record supported the conclusion that a substantial number of consumers believed products marked or described as “platinum” are nearly pure and possess certain desirable qualities that some platinum/base metal alloys may not possess. In addition, the Commission stated that the record indicated that if a description of a platinum/base metal alloy as “platinum” is qualified only with a content disclosure using numbers and chemical abbreviations, consumers likely would not understand the disclosure. However, there was no

¹⁷ It does not appear that the PGI tests evaluated a product identical in composition to the Karat Platinum platinum/base metal alloy.

¹⁸ 73 FR 10190 (Feb. 26, 2008).

evidence that a more descriptive disclosure would not adequately qualify the claim. The Commission, therefore, proposed specific qualifying disclosures.¹⁹

The Commission's proposal provided that marketers may physically mark or stamp a platinum/base metal alloy jewelry article with the product's chemical composition (e.g., 585 Pt./215 Co./200 Cu.), but that when making any other representation that the product contains platinum, marketers should clearly and conspicuously disclose, immediately following the name or description of the product:

- (1) that the product contains platinum and other non-platinum group metals;
- (2) the product's full composition, by name and not abbreviation, and the percentage of each metal; and
- (3) that the product may not have the same attributes or properties as products containing at least 850 ppt pure platinum, or at least 500 ppt pure platinum and at least 950 ppt PGM.

The proposed amendment also included a substantiation provision that allowed marketers to forgo the third disclosure if they had competent and reliable scientific evidence that, with respect to all attributes material to consumers (e.g., the product's durability, hypoallergenicity, resistance to tarnishing and scratching, and the ability to resize or repair the product), their product is equivalent to products containing at least 850 ppt pure platinum, or at least 500 ppt pure platinum and at least 950 ppt PGM.

In the 2008 FRN, the Commission again sought comment whether it should revise the Platinum Section to address platinum-clad, filled, plated, or overlay products and, if so, how.

B. Summary of the Comments

¹⁹ Id. at 10196-10197.

In response, the Commission received 58 comments.²⁰ Most were short without detailed discussion. However, Karat Platinum; JVC, on behalf of several industry associations;²¹ and PGI submitted detailed comments. The JVC and PGI comments included survey evidence.

We summarize the comments and survey evidence below addressing: (1) use of the word “platinum” to describe platinum/base metal alloys; (2) the Commission’s proposed disclosures; (3) harmonization with international standards; (4) the commenters’ proposed amendments to the Guides; and (5) guidance regarding platinum-clad, filled, plated, or overlay jewelry.

1. Use of the Word “Platinum”

Many commenters asserted that use of the term “platinum” to describe a platinum/base metal alloy would deceive consumers in a manner that could not be remedied with disclosures.²² Most made this assertion without supporting evidence. JVC and PGI, however, relied on the findings from PGI’s 2005 Platinum Awareness Study and provided 2008 survey evidence (“2008 Platinum Attitude Study”).²³ Specifically, PGI pointed to the 2008 survey’s findings that consumers expect products marked or described as “platinum” to be nearly pure and that products with “platinum,” in their name, such as “Karat Platinum,” “Platinum Five,” or “Platinum V,” confuse or mislead

²⁰ The 58 comments can be found at:
<http://www.ftc.gov/os/comments/jewelryplatinum2/index.shtm>.

²¹ JVC submitted its comment on behalf of JVC, the Manufacturing Jewelers and Suppliers of America, the Jewelers of America, and the American Gem Society.

²² See JVC Comment at 2; PGI Comment at 2-3.

²³ Dr. Thomas J. Maronick conducted both studies. The title of the 2008 Attitude Study is: “Platinum Attitude Study: Four Empirical Studies of Consumers’ Attitudes Toward Platinum and Substitutes as Options in Engagement Ring Settings.”

consumers concerning the products' metal content and attributes.²⁴ PGI argued that because of these perceptions, it is inherently misleading to refer to platinum/base metal alloys as “platinum,” and the deception cannot be cured by qualifying language.²⁵ Therefore, JVC and PGI asserted that marketers should describe platinum/base metal alloys using a name that does not include “platinum” or “plat,” so consumers will not be confused or misled about the alloy's contents or attributes.²⁶ Tiffany & Co. (“Tiffany”) agreed, suggesting that platinum/base metal alloys should be “creatively

²⁴ PGI Comment at 10-11. PGI's consumer surveys asked consumers whether they would expect products described with these terms to possess the attributes of higher purity platinum/other PGM products. PGI Comment, Attachment A, 2008 Platinum Attitude Study 2 at 1-4. The survey found:

	Definitely Yes	Probably Yes	Maybe
Karat Platinum	18%	42%	21%
Platinum Alloy	6%	18%	24%
Platinum Five	8%	23%	36%
Platinum V	8%	25%	33%
Platifina	3%	8%	22%
Palarium	4%	8%	19%

²⁵ PGI Comment at 3. See also Tiffany & Co. Comment (stating that consumers expect a product labeled “platinum” to contain an industry standard metal of 500 ppt pure platinum with 950 total PGM); Lowell Kwiat Comment (explaining that today's platinum is generally 95% pure); Gaetano Cavalieri Comment (noting that the industry standard practice for generations has restricted platinum to alloys containing no fewer than 850 ppt pure platinum); Richard Frank Comment (commenting that platinum has traditionally been 90% platinum, 10% iridium); William Holland Comment (noting that platinum jewelry has always been known to be 90% pure or higher); Joseph Klein Comment (platinum was never less than 85% pure under any definition); Charles Wallace Comment (“[p]latinum has forever been sold as an item of purity and should remain so.”).

²⁶ See PGI Comment at 2, 12, 26-28, 34-35; JVC Comment at 2-3, 6-7, 14, 18.

and individually named by the manufacturer.”²⁷ Several other commenters recommended that the FTC “consider a new and different name” for the alloy but did not propose a particular name.²⁸

Karat Platinum disagreed, arguing that the term “platinum” can be qualified sufficiently so that consumers understand that a product is not pure platinum.²⁹ Karat Platinum, however, did not submit any survey evidence.

2. The Commission’s Proposed Disclosures

JVC and PGI asserted that the Commission’s three proposed disclosures were confusing, inadequate, and unworkable. Karat Platinum disagreed, but suggested some revisions to the third disclosure and asserted that marketers of higher purity platinum or platinum/PGM jewelry should be subject to the proposed second and third disclosures. Below, we discuss the three proposed disclosures.

(a) First Proposed Disclosure

The first proposed disclosure provided that marketers of platinum/base metal alloys state that their product “contains platinum and other non-platinum group metals.” Several commenters argued that this disclosure will confuse consumers. For example, 54% of consumers surveyed in the 2008 Platinum Attitude Study did not know what the phrase “other non-platinum group metals” meant.³⁰ PGI further stated that when the survey asked consumers to classify metals as platinum or

²⁷ Tiffany Comment at 3. Kwiatt agreed, stating that marketers should call consumers’ attention to this “new innovation” by giving it “a different name which reflects the fact that it is different than what has been customary.” Lowell Kwiatt Comment at 2.

²⁸ See, e.g., Birks & Mayors, Inc. Comment; Ben Bridge Jeweler Comment; Joseph Cresalia Comment.

²⁹ Karat Platinum Comment at 6-8.

³⁰ PGI Comment, Attachment A, 2008 Platinum Attitude Study 4 at 1-2. In addition, 26%

non-platinum group, they were largely unable to do so correctly.³¹ Karat Platinum, by contrast, commented that this disclosure would provide useful information to consumers about the product.³²

(b) Second Proposed Disclosure

The Commission's second proposed disclosure provided that marketers list the full composition of the product (by name and not abbreviation) and the percentage of each metal. JVC and PGI asserted that consumers will not comprehend this disclosure. In support of this position, JVC cited the 2008 Platinum Attitude Study. Specifically, when consumers were asked whether they understood the meaning of "58.5% Platinum and 41.5% Copper/Cobalt," 55% said yes, 33% stated that they did not know, and 12% stated that they were not sure.³³ Moreover, JVC opined that because consumers will not understand the disclosure, they will focus only on the term "platinum" and believe that the product is the equivalent of platinum products that are at least 85% platinum.³⁴ PGI added that listing the percentages of each metal still may not alert consumers of the differences between "diluted" platinum alloys and higher purity products.³⁵

stated they were not sure what "other non-platinum group metals" were.

³¹ Id. at 2. Respondents were asked whether they understood the phrase "other non-platinum group metals" and then were given a list of metals and asked if any of them were "other non-platinum group metals." In response to the follow-up, 29% of respondents stated that palladium was an "other non-platinum group metal;" 61% said they were not sure; and 11% said no. Palladium is a platinum group metal. Similarly, 39% stated copper was an "other non-platinum group metal;" 47% stated they were not sure; and 13% said no. Copper is a non-platinum group metal. Id.

³² See Karat Platinum Comment at 6.

³³ See JVC Comment at 8. See PGI Comment, Attachment A, 2008 Platinum Attitude Study 3 at 2. By contrast, when asked if consumers knew what 585Pt.415Co.Cu. meant 81% said no, 13% said yes, and 7% said they were not sure. Id. at 1.

³⁴ JVC Comment at 8.

³⁵ PGI Comment at 4.

Tiffany agreed and asserted that disclosing each alloying component in full without abbreviation would not achieve consumer knowledge. Tiffany noted that research has shown that consumers do not understand metal content disclosures. Thus, it contended that “disclosing that the ‘platinum’ piece has a certain percentage of copper . . . is not instructive.”³⁶

In contrast, Karat Platinum asserted that disclosing the composition of platinum/base metal alloys using the full names and percentages of the constituent metals is a good practice.³⁷ It explained that the Commission’s proposed disclosures – that the product contains platinum and other non-platinum group metals and the full names and percentage of the metals – “provides the greatest likelihood of effectively conveying information to consumers.”³⁸ However, it noted that marketers of “high grade and platinum/PGM” do not have to disclose their products’ full composition.³⁹ Karat Platinum asserted that the Commission should remedy this inconsistency and modify the second proposed disclosure to provide that all marketers of platinum products make full compositional disclosures.⁴⁰

Karat Platinum opined that full compositional disclosure for all platinum products would benefit consumers in at least two ways. First, it asserted that it is a “myth” that platinum/PGM products are composed of an industry-standard material. It noted that high-grade platinum products may have “dramatically different” characteristics. For example, it compared two platinum rings, one containing 95% platinum and 5% ruthenium with another containing 95% platinum and 5%

³⁶ Tiffany Comment at 2.

³⁷ Karat Platinum Comment at 6.

³⁸ Id.

³⁹ Id.

iridium. It stated that the former product is “significantly more scratch resistant and durable.”⁴¹

Second, Karat Platinum explained that certain marketers “have engaged in the long-standing practice of characterizing high-grade and platinum/PGM alloys as ‘pure’ platinum” when the products all contain less than 100% platinum.⁴² Karat Platinum, however, did not submit any consumer perception evidence indicating that the current marketing for higher purity platinum/other PGM products misleads consumers.

(c) Third Proposed Disclosure

The Commission's third proposed disclosure provided that marketers disclose “that the product may not have the same attributes as products containing at least 850 parts per thousand pure Platinum, or at least 500 parts per thousand pure Platinum and at least 950 parts per thousand PGM.”⁴³ The proposed amendment further provided that a marketer need not make this third disclosure “if the marketer has competent and reliable scientific evidence that, with respect to all attributes material to consumers . . . such product is equivalent to [higher purity platinum/other PGM] products.” Many commenters asserted that this disclosure is confusing and unworkable.

(i) The Disclosure Is Confusing

Several commenters asserted that the third disclosure is confusing because it does not require that marketers specify the attributes of platinum/base metal alloys that differ from platinum/PGM products or explain how the alloy differs with respect to these attributes. The 2008

⁴⁰ Karat Platinum Comment at 6-7.

⁴¹ Id. at 6.

⁴² Id. at 7.

⁴³ 73 FR 10190, 10197.

Platinum Attitude Study asked consumers about eight separate product attributes of platinum/base metal engagement rings: durability, luster, density, scratch resistance, tarnish resistance, ability to be resized or repaired, hypoallergenicity, and the retention of precious metal content over time. From 40% to 80% of consumers surveyed (depending on the product property) would expect a salesperson to inform them about these attributes and would also want the information physically attached to the product.⁴⁴ JVC asserted that these results demonstrate that the proposed disclosure “will not impart any of the information consumers want and need.”⁴⁵ The 2008 survey, however, did not evaluate consumer understanding of the third proposed disclosure.

JVC asserted that “[t]o make this disclosure fair and complete, full disclosure about each of the eight important attributes . . . would be required.”⁴⁶ JVC explained: “[a] consumer could easily purchase a [platinum/base metal alloy] ring without understanding that it might not hold a diamond as well, or might tarnish, or may not be hypoallergenic.”⁴⁷ Other commenters expressed similar concerns.⁴⁸

Tiffany, for example, explained that “[o]ur experience has shown that consumers who are in the process of buying a platinum product, feel as though they understand the product’s makeup (platinum is pure) and characteristics (hypoallergenicity and others) and are there (typically in a rush) to decide based on issues such as style and fit, not a chemistry discussion of alloy makeup.”⁴⁹

⁴⁴ PGI Comment, Attachment A, 2008 Platinum Attitude Study 1 at 3.

⁴⁵ JVC Comment at 11.

⁴⁶ Id.

⁴⁷ Id. at 10-11.

⁴⁸ See, e.g., Anne Howitt Comment; Michael Kranish Comment.

⁴⁹ Tiffany Comment at 4.

Tiffany opined that this disclosure, combined with the second, full composition disclosure, will baffle and frustrate consumers, potentially causing them to walk away from the sale.

(ii) The Disclosure Is Unworkable

The comments further asserted that marketers cannot realistically deliver the third proposed disclosure. Specifically, JVC and PGI contended that the 2008 Platinum Attitude Study found that consumers expect jewelry information to be physically attached to the product.⁵⁰ However, both JVC and PGI asserted that the volume of information included in the disclosure, combined with the first and second proposed disclosures, cannot be attached to the jewelry itself, or on a small tag affixed to the jewelry.⁵¹ JVC further stated that if the third proposed disclosure is revised to include additional information necessary to fully inform consumers, this additional information will make attachment to jewelry more difficult.⁵² Therefore, JVC noted, jewelry sales personnel will need to orally disclose the information, or provide it in writing with the purchase.

Several commenters asserted that reliance on the salesperson or on written information delivered with the purchase is problematic. JVC opined that the average jewelry salesperson would be hard pressed to deliver this information.⁵³ It further asserted that the jewelry retail sales force is not equipped to discuss this complex metallurgical disclosure and simply will not provide the

⁵⁰ JVC Comment at 12; PGI Comment at 11.

⁵¹ JVC Comment at 11-12; PGI Comment at 4.

⁵² JVC Comment at 12-13.

⁵³ Id. Similarly, a jeweler commented that it is unrealistic for the public to depend on retail sales personnel to accurately disclose and explain the differences between platinum/PGM products and the platinum/base metal alloy. This jeweler stated that the reality of the marketplace is that sales personnel are unlikely to explain jewelry specifications unless they are specifically asked. Lowell Kwiat Comment at 1.

information, or will provide incorrect information.⁵⁴ PGI noted that it would be difficult, if not impossible, to ensure that the sales personnel impart correct information comparing all of the differences between a multitude of new alloys.⁵⁵

In addition, JVC submitted a Jewelers of America (“JA”) study that asked JA members about the “realities” of selling jewelry. The JA study, in part, found that 57.4% of the respondents said that it would be “difficult” or “very difficult” to tell consumers that the jewelry may not have the attributes of higher purity platinum products and to explain those differences.⁵⁶ JVC asserted that such technical disclosures – spoken or written – at the point of sale are likely to have a “chilling” effect and that consumers “may very well walk away from any product that requires these confusing, lengthy and unappealing disclosures.”⁵⁷

Moreover, JVC explained that nearly half of the respondents to the JA study stated that attribute disclosures could not be attached to the jewelry in the form of a tag or other physical means.⁵⁸ Several commenters concurred, asserting that without physical attachment, the disclosures likely will not remain with the jewelry product over time. JVC explained that the jewelry could be re-sold, repaired, or appraised without any identification of the alloy.⁵⁹ It asserted that a jeweler repairing a platinum/base metal alloy might not know the contents and this could create the risk that the item will be damaged during the repair process. A jewelry repair dealer

⁵⁴ JVC Comment at 12.

⁵⁵ PGI Comment at 4.

⁵⁶ JVC Comment at 12-13; Attachment Six A.

⁵⁷ Id. at 13.

⁵⁸ Id. at 12-13.

⁵⁹ Id. at 13.

expressed similar concern, explaining: “it will be virtually impossible for any jewelry repair technician to properly repair or size . . . jewelry under the new proposal.”⁶⁰ Another commenter opined that, short of an assay of the jewelry piece, the platinum/base alloy product distinctions “will not be discernible even to the well trained professional.”⁶¹

In contrast, Karat Platinum asserted that the proposed disclosures do not need to include more detailed information or be physically attached to the platinum/base metal alloy products. It suggested that marketers’ inclusion of the proposed disclosures with the marketing materials “is more than sufficient to ensure that the information is available to consumers.”⁶² It further opined that, by making marketing material available, consumers are “provided with sufficient information to put them in a position to inquire from their jewelers, or from other knowledgeable sources, such as a company’s marketing information, website, or the internet, as to the relative value, properties, and characteristics of a product.”⁶³ Similarly, another commenter stated that the point of sale is the ideal way to inform consumers of the platinum/base metal alloy content.⁶⁴

(d) The Substantiation Provision

Many commenters asserted that the substantiation provision that allows marketers to avoid making the third disclosure is inadequate and unworkable because it is too vague and gives marketers too much discretion. JVC and PGI explained that, even though the proposed amendment

⁶⁰ Steven DiFranco Comment. See also Anne Howitt Comment; Peter LeCody Comment.

⁶¹ Lowell Kwiat Comment at 1.

⁶² Karat Platinum Comment at 5.

⁶³ Id.

⁶⁴ Hoover & Strong Comment. Hoover & Strong is a wholesale jewelry manufacturer.

lists five important attributes as examples,⁶⁵ the seller self-determines which product attributes are material.⁶⁶ JVC asserted that a disclosure that relies on a subjective standard presents endless possibilities for non-compliance.⁶⁷ Moreover, JVC explained that because “there are no industry-wide, universally-accepted testing methods that produce ‘competent and reliable’ evidence,” there is no standard for testing these attributes.⁶⁸ PGI similarly noted that marketers are inappropriately left to their own devices to “cherry pick” which tests they should conduct to self-determine that they are exempt from making a particular disclosure.⁶⁹

Karat Platinum raised three concerns with the adequacy of the platinum attributes listed in the provision. First, it explained that the five attributes listed in the provision do not include all the attributes that the 2005 Platinum Awareness Study identified as important to the greatest number of consumers.⁷⁰ For example, in that study a substantial majority of consumers indicated they would want to know the weight of a product setting, yet that characteristic was not included explicitly in the third proposed disclosure. Second, Karat Platinum noted that because Dr. Maronick pre-selected the attributes, the participants had no choice in deciding which characteristics were important. Third, it asserted that when participants were allowed to write in the characteristics important to them they “indicated that they would want to know ‘everything’ about the platinum

⁶⁵ The five attributes in the proposed amendment are: durability, hypoallergenicity, resistance to tarnishing, resistance to scratching, and the ability to re-size or repair the product.

⁶⁶ JVC Comment at 9; PGI Comment at 4.

⁶⁷ JVC Comment at 9.

⁶⁸ Id.

⁶⁹ PGI Comment at 4.

⁷⁰ Karat Platinum Comment at 4.

product.”⁷¹ Thus, Karat Platinum recommended the Commission “conduct independent fact finding to determine what properties are material to consumers.”⁷²

In addition, Karat Platinum contended that the Commission should provide that all marketers of platinum products – not just those marketing platinum/base metal alloys – “maintain evidence that their product meets those expectations,” or alert consumers that they do not.⁷³

3. Harmonization with International Standards

JVC, PGI, and numerous other commenters asserted that the Commission’s proposal is not in harmony with international standards and will impede foreign commerce.⁷⁴ JVC explained that products made of platinum/base metal alloys cannot be sold as “platinum” in foreign jurisdictions that have adopted standards promulgated by the International Organization for Standardization (“ISO”) or the World Jewellery Confederation (“CIBJO”).⁷⁵ Moreover, JVC noted that platinum/base metal alloys could not be sold as “platinum” products in “hallmarking” countries – those that require that precious metal jewelry (including platinum) be stamped by approved assaying guilds before they are sold – because they contain base metals.⁷⁶ Thus, JVC opined that if

⁷¹ Id. at 5.

⁷² Id.

⁷³ Id.

⁷⁴ See, e.g., JVC Comment at 14-18; PGI Comment at 5, 18-20; Ben Bridge Jeweler Comment; Birks & Mayors Comment; Gaetano Cavalieri Comment at 1-3; Joseph Cresalia Comment; Shannon Daly Comment; Tiffany Comment at 1-2; Anne Howitt Comment; Norie Jenkins Comment; Annette Kinzie Comment; Robert McGee Comment; Mark Noelke Comment; Elizabeth Parker Comment; M. Strutz Comment; Craig Warburton Comment.

⁷⁵ JVC Comment at 14-18. JVC explained that the ISO and CIBJO standards restrict the use of the word “platinum” to platinum/PGM alloys. Id. at 16-17.

⁷⁶ JVC explained that England, France, Germany, and Switzerland are hallmarking countries. Id. at 15, n.22.

platinum/base metal alloy products are marketed as “platinum” in the U.S., it “will undermine the international perception of U.S.-made products, threatening the integrity of the entire US-platinum jewelry market abroad.”⁷⁷ Tiffany agreed, noting that the FTC should not take actions to place manufacturers in a situation where their products are not salable overseas.⁷⁸

4. Other Suggestions Regarding the Commission’s Proposed Amendments

JVC proposed that the Commission amend the Guides to provide that marketers cannot describe any product containing more than 5% non-platinum group metal as “platinum.”⁷⁹ JVC also proposed revising the Guides to state that certain practices are unfair or deceptive instead of stating that they may be misleading. Karat Platinum suggested that the provision in the Commission’s proposed amendment allowing marketers to physically stamp platinum/base metal alloys with their chemical composition and the substantiation provision be included in section 23.7(c) of the Platinum Section, instead of section 23.7(b).⁸⁰ Because section 23.7(c) discusses markings that the Commission would not consider misleading, Karat Platinum explained that the amendment permitting physical stamping is more appropriate in that section.

5. Platinum-Clad, Filled, Plated, or Overlay Products

In its 2008 FRN, the Commission also solicited comments concerning whether it should amend the Platinum Section to address other products that contain platinum, such as platinum-clad, filled, plated, coated, or overlay products, which the Guides currently do not address. The

⁷⁷ Id. at 18.

⁷⁸ Tiffany Comment at 1.

⁷⁹ JVC Comment at 2-3, Attachment One at 2.

⁸⁰ Karat Platinum Comment at 3-4.

Commission received several comments in response. Most did not recommend specific guidance, but asserted that, if the Commission amends the Guides to provide that platinum/base metal alloy products should be described with a “non-platinum” descriptor, then such “descriptors should also apply to plated, filled, rolled, and any other form that is not complete or near complete of platinum content.”⁸¹

JVC commented that the Commission should provide “standards” regarding the thickness of the plating to ensure durability – similar to those set for gold – to protect consumers against deceptive practices.⁸² Its proposed provision stated that surface-plating with platinum should be composed of at least 950 ppt platinum and specified a minimum thickness of .125 microns of platinum electroplate and .5 microns for heavy electroplate. JVC’s proposal also provided that, if the plating is of at least 950 ppt platinum, but does not meet the minimum thickness, then the product should be described as “platinum-flashed” or “platinum-washed.” The proposal also stated that certain descriptions may be misleading: “overlay,” “filled,” “clad,” “rolled-plate,” “covered,” or “coated.”⁸³ However, JVC did not provide evidence that consumers are being, or are likely to be, deceived by any current marketing for platinum-plated jewelry or evidence that JVC’s proposed terms would not mislead consumers.

III. ANALYSIS

⁸¹ Michelle Broyles Comment; Don Broyles Comment; Walter Hardin Comment; Vickie Martin Comment; Robert Pate Comment; Randall Sims Comment.

⁸² JVC Comment at 26-27. JVC commented that because there is no indication that marketers are selling platinum-filled or platinum-clad items, the Guides do not need to address those products. Id.

⁸³ Id. Attachment Three, which contains a comment by Michael A. Akkaoui from Tanury Industries, regarding platinum plating, is in accord with JVC’s comment.

Based on the complete record, the Commission amends the Guides to address the marketing of products containing platinum/base metal alloys. The purpose of the Jewelry Guides is to help marketers avoid deceptive or unfair conduct.⁸⁴ The record demonstrates that deception will likely result if marketers describe platinum/base metal alloys as “platinum” without disclosing additional information. The record, however, does not show that the qualified use of the term “platinum” would be deceptive. Moreover, the record furnishes sufficient evidence for the Commission to provide guidance on qualifying disclosures.

Thus, the Commission concludes that it should amend the Guides to state that marketers may describe platinum/base metal alloys as “platinum” with appropriate disclosures. Amending the Guides in this manner is superior to the other available options: 1) amending the Guides to state that marketers should not describe such products as “platinum,” or 2) not addressing the issue in the Guides at all.

Commenters, however, raised several concerns about the disclosures the Commission proposed in its 2008 FRN. The Commission has considered these comments and addresses them below, either revising its previous proposal or explaining why the record does not support revision. Finally, the Commission declines to amend the Guides to address the marketing of products with platinum plating or coatings at this time.

A. The Record Shows that Deception Will Likely Result if Marketers Describe Platinum/Base Metal Alloys as “Platinum” without Qualification.

In 2005, the Commission found that deception would likely result if marketers describe platinum/base metal alloys as “platinum” without disclosing information regarding their

⁸⁴ See 16 C.F.R. 1.5. The purpose of the Guides is to prevent deception, not to codify the rules set by standard setting bodies. See *id.* §§ 1.5-1.6.

composition and attributes.⁸⁵ The 2008 comments do not dispute this finding.⁸⁶ In fact, newly submitted consumer perception data further supports this conclusion.

Specifically, the 2008 Platinum Attitude Study, like the 2005 Platinum Awareness Study, shows that most consumers expect products described as “platinum” to contain a high percentage of platinum. Fifty-nine percent (59%) of the consumers surveyed expect a product described as “platinum” to contain at least 80% pure platinum and 69% expect at least 75% pure platinum.⁸⁷ The new data also show that many consumers expect products described using names that include the word “platinum,” or the root “plat,” to have the same attributes as products traditionally marketed as “platinum” to consumers in the United States.⁸⁸ For example, 60% of those surveyed expect that a product described as “Karat Platinum” would definitely or probably have the same attributes as “platinum;” and 24% expect that even a product described as “Platinum Alloy” would definitely or probably have the same attributes as platinum.⁸⁹

These expectations, however, will often not be met with products made from platinum/base metal alloys. Specifically, PGI’s 2005 testing indicates that certain platinum/base metal alloys are inferior to platinum/PGM products in terms of wear and oxidation resistance, as well as weight loss,

⁸⁵ See 73 FR 10190, 10192-10194 for a detailed summary of the 2005 FRN comments.

⁸⁶ See, e.g., PGI Comment at 1-2; JVC Comment at 5; Karat Platinum Comment at 2.

⁸⁷ PGI Comment, Attachment A, 2008 Platinum Attitude Study at 5 (these percentages are cumulative).

⁸⁸ PGI identified the four most commonly used platinum alloys in the United States: 90% Platinum/10% Iridium; 95% Platinum/5% Iridium; 95% Platinum/5% Cobalt; and 95% Platinum/5% Ruthenium. Maerz, Jurgen J., “Platinum Durability vs. Scratching,” posted at www.platinumguild.com/files/pdf/V6N8W_platinum_durability.pdf. All four alloys have at least 90% platinum. Several comments explained that platinum jewelry generally or traditionally has had at least 85%, 90%, or 95% platinum. See *supra* note 24.

and that they cannot be resized using certain procedures.⁹⁰ Moreover, Karat Platinum's 2005 testing shows that its platinum/base metal alloy is less dense than platinum/PGM products.⁹¹ Therefore, describing such products as "platinum" without qualification is likely to result in deception regarding their purity and attributes.

B. The Record Does Not Support Amending the Guides to State that Using the Term "Platinum" to Describe Platinum/Base Metal Alloys Is Necessarily Deceptive.

As noted earlier, JVC, PGI, and numerous retailers opposed amending the Guides to state that marketers of platinum/base metal alloys may describe them as "platinum" in a qualified manner. These commenters contended that marketers cannot describe such alloys as "platinum" without deceiving consumers no matter what information they disclose. Accordingly, they recommended that the Commission amend the Guides to state that marketers should not describe such alloys as "platinum."⁹²

In evaluating whether a representation is misleading the Commission examines not only the claim itself, but the net impression of the entire advertisement.⁹³ Thus, in order to state that

⁸⁹ PGI Comment, Attachment A, 2008 Platinum Attitude Study 2 at 1-4.

⁹⁰ PGI Comment 2005, Attachments C and D. It does not appear that the PGI tests evaluated a product identical in composition to the Karat Platinum platinum/base metal alloy.

⁹¹ Karat Platinum's testing showed that its alloy is superior to platinum/PGM products in terms of strength, hardness, and casting ability, and that its ability to resist corrosion is equivalent to other platinum products. See Karat Platinum Comment 2005 at 2-3.

⁹² JVC and PGI acknowledged that a qualified use of the word "platinum" could, in theory, address consumer confusion or deception stemming from the use of the term "platinum" to describe platinum/base metal alloys. Yet, JVC and PGI asserted that it would be impracticable and likely ineffective to make the lengthy, detailed disclosures that they believe marketers would need to make to prevent deception.

⁹³ Deception Policy Statement, 103 F.T.C. at 179 n.32 (when evaluating representations

marketers should never describe platinum/base metal alloys as “platinum,” the Commission would have to conclude that no reasonable qualification is sufficient to render the term non-deceptive. The record, however, does not support this position. The 2008 Platinum Attitude Study suggests that a clear majority of consumers (55%) understood the proposed full name and percentage content disclosure.⁹⁴ In contrast, only 13% of consumers said they understood disclosures using abbreviations.⁹⁵

Moreover, the study likely understates the effectiveness of the proposed full name and percentage content disclosure for several reasons. First, this disclosure is designed to work in tandem with the third proposed disclosure (that the product may not have all the attributes of platinum/PGM), and the study did not test the third disclosure, either alone or in conjunction with the full name and percentage content disclosure. Second, some consumers who stated that they did not understand the disclosure may have understood that the item contained 58.5% platinum but found the phrase “41.5% Copper/Cobalt,” which did not disclose the percentage of each metal, confusing. Third, as discussed in section III.C.2 below, consumer perception data regarding gold jewelry shows that the proposed full name and percentage content disclosure likely would be even

under a deception analysis, one looks at the complete advertisement and formulates opinions “on the basis of the net general impression conveyed by them and not on isolated excerpts”). Depending on the specific circumstances, qualifying disclosures may or may not cure otherwise deceptive messages or practices. Id. at 180-81.

⁹⁴ See PGI Comment, Attachment A, 2008 Platinum Attitude Study 3 at 1-2. When asked if they understood the meaning of “58.5% Platinum and 41.5% Copper/Cobalt,” 55% said yes, 33% stated no, and 12% stated that they were not sure.

⁹⁵ Id. When asked if they knew what 585Pt; 415CoCu meant, 81% said no, 13% said yes, and 7% said they were not sure.

more effective than the above figures suggest. On its face, this second disclosure appears to be clear, and the record lacks any evidence to the contrary.

Finally, guidance stating that marketers cannot describe platinum/base metal alloys using the term “platinum” would deprive consumers of truthful information, specifically that those products are primarily comprised of platinum.⁹⁶

C. The Record Demonstrates That Disclosure Is the Appropriate Means for Attempting to Prevent Deception.

Having determined that describing platinum/base metal alloys as “platinum” without qualification will likely lead to deception, and that the record does not show that the qualified use of the term “platinum” would be deceptive, the Commission concludes that disclosures are the appropriate means for attempting to prevent deception. Because the comments and new consumer perception evidence reinforce the concerns the Commission considered in its 2008 FRN, the following analysis begins with the Commission’s proposed three-tiered disclosure regime.

1. The Commission’s First Proposed Disclosure

The first proposed disclosure provided that marketers of platinum/base metal alloys disclose that their products “contain platinum and other non-platinum group metals.” The 2008 Platinum Attitude Study, however, suggests that few consumers understand this disclosure. Only 20% of those surveyed indicated that they knew what the phrase “other non-platinum group metals” meant.⁹⁷ Moreover, many consumers who said either they “knew” or “were not sure of” the

⁹⁶ Advising marketers not to use the term “platinum” to describe platinum/base metal alloys would prevent them from describing a product composed of 84% platinum and 16% copper as “platinum,” while competitors could use the term to describe a product composed of only 50% platinum, 45% iridium, and 5% copper.

⁹⁷ PGI Comment, Attachment A, 2008 Platinum Attitude Study at 16.

disclosure's meaning did not know whether cobalt, copper, palladium, rhodium, and silver are non-platinum group metals (over 60% for cobalt, palladium, and rhodium, and 47% for copper and silver).⁹⁸ The Commission, therefore, concludes that this disclosure is unlikely to provide useful information. Accordingly, the adopted amendment excludes this provision.⁹⁹

2. The Commission's Second Proposed Disclosure

The second proposed disclosure provided that marketers of platinum/base metal alloys disclose the product's full composition, by name and not abbreviation, and the percentage of each metal in the product.¹⁰⁰ The consumer perception data suggests that the majority of consumers understand this disclosure. Indeed, 55% of those surveyed indicated that they knew what the phrase "58.5% Platinum and 41.5% Copper/Cobalt" meant.¹⁰¹ In addition, the "vast majority" of

⁹⁸ Id. at 16-17.

⁹⁹ The Commission considered revising this provision to state that marketers should disclose that platinum/base metal alloys contain "platinum and other metals" or "base metals." The record, however, does not include any consumer perception evidence suggesting that these disclosures would provide useful information. Furthermore, the second disclosure already provides the metal content of platinum/base metal alloys. More importantly, many platinum/PGM products also contain metals other than platinum, including base metals; therefore, such a disclosure would not likely help consumers distinguish platinum/base metal alloys from such products.

¹⁰⁰ The 2005 Platinum Awareness Study suggests that most consumers do not understand numeric jewelry markings using parts per thousand and chemical abbreviations, such as "585 Pt./415 Co.Cu." PGI Comment 2005, Attachment A, 2005 Platinum Awareness Study at 7-8, 25-26. Indeed, only 7.5% stated they knew what this marking meant, and only 6.9% of those consumers actually understood that the marking described the proportion of platinum and other metals in the jewelry product. Id. at 26. The 2008 Platinum Attitude Study suggests that most consumers do not understand chemical abbreviations. Indeed, 81% of those surveyed said they did not know what "585 Pt; 415 CoCu" meant. PGI Comment, Attachment A, 2008 Platinum Attitude Study at 14-15. Of those who said they knew or were not sure, only one correctly responded that it meant "585 parts platinum, 415 parts cobalt/copper." Therefore, keeping the percentage disclosure will assist consumers' understanding of the product's content.

¹⁰¹ PGI Comment, Attachment A, 2008 Platinum Attitude Study at 14-15. Thirty three

those who indicated either they “knew” or “were not sure” what the disclosure meant correctly identified the platinum and copper/cobalt combination or indicated that the product had a combination of the metals.¹⁰²

Although a substantial minority of consumers surveyed said they did not understand the disclosure, or were not sure what it meant, many of those consumers may have understood that a product with 58.5% platinum is less “pure” than traditional platinum products.¹⁰³ Indeed, consumer perception data addressing gold jewelry suggests that this is the case. Specifically, even though many consumers cannot define the term “14 karat gold” accurately, they understand that “14 karat” represents the amount of gold in the product and that 18 karat gold jewelry contains more gold than 14 karat gold jewelry.¹⁰⁴ Similarly it is reasonable to conclude that consumers would understand that a product labeled 58.5% platinum would contain a lower percentage of platinum than a product they expect to have 85% platinum. Therefore, the Commission concludes that the second proposed disclosure is the best option for addressing possible deception regarding the purity of platinum/base metal alloys.

Furthermore, consumer perception data suggests that this type of disclosure would also help prevent deception regarding the attributes of platinum/base metal alloys. Specifically, survey participants were asked whether a ring containing 58.5% Platinum and 41.5% Copper/Cobalt is

percent (33%) stated that they did not know, and 12% stated that they were not sure. Id.

¹⁰² Id. at 15. The 2008 Platinum Attitude Study did not indicate the number or exact percentage of respondents who responded in this manner, only this characterization.

¹⁰³ Id. at 14-15; see also PGI Comment at 10-11.

¹⁰⁴ PGI Comment 2005, Attachment A, Platinum Awareness Study at 24.

likely to differ from a platinum ring on eight specific attributes.¹⁰⁵ Depending on the attribute, between 28% and 43% of the respondents indicated the ring would differ from platinum.¹⁰⁶ This data suggests that many consumers exposed to this type of disclosure do not have the impression that platinum/base metal alloys have the same attributes as platinum/PGM products. More than half the consumers surveyed, however, indicated that they “were not sure” or “did not know” whether the product differed from platinum.¹⁰⁷ Therefore, further disclosure is needed to avoid deception.

3. The Commission’s Third Proposed Disclosure

The third proposed disclosure advised marketers to state that a platinum/base metal alloy may not have all the attributes that consumers associate with higher purity platinum/PGM products. It also provided that marketers need not make this disclosure if they possess competent and reliable scientific evidence that, with respect to all attributes material to consumers, such product is equivalent to products containing at least 850 ppt pure platinum, or at least 500 ppt pure platinum and at least 950 ppt PGM. The comments filed in 2008 raise six concerns regarding this provision.

First, commenters noted that many consumers do not understand the terms “platinum group metals” or “other non-platinum group metals.”¹⁰⁸ As a result, it is likely that these consumers would

¹⁰⁵ The attributes were durability, luster, density, scratch resistance, tarnish resistance, ability to be resized, hypoallergenicity, and retention of precious metal over time. PGI Comment, Attachment A, 2008 Platinum Attitude Study at 16.

¹⁰⁶ Id.

¹⁰⁷ Id. Between 47% and 55% of those surveyed indicated they “did not know” or “were not sure” whether the product differed from platinum, depending on the attribute.

¹⁰⁸ JVC Comment at 8; see also PGI Comment at 13, 35-36 (The 2008 Platinum Attitude Study revealed that 80% of consumers do not understand the phrase “other non-platinum group metals.”); Attachment A, 2008 Platinum Attitude Study at 16-17.

not fully understand this disclosure. To address this issue, the Commission has revised the disclosure to replace the reference to PGM with the phrase “traditional platinum products.”

The most common platinum jewelry currently marketed in the United States contains at least 85% platinum.¹⁰⁹ Consumers, therefore, would reasonably understand that traditional platinum products are those having the attributes of products containing at least 85% platinum. This conclusion is further supported by the 2008 survey and comments from industry demonstrating that consumers expect platinum products to be from 85% to all or almost all pure. The amended Guides, therefore, treat “traditional platinum” as that containing at least 85% pure platinum. This change provides consumers with a short, clear disclosure which is consistent with their current views. Additionally, the new definition provides a more limited universe of comparison, which should help marketers respond to questions precipitated by the disclosure.¹¹⁰

Second, several comments suggested that the Commission specify each material attribute identified in the consumer perception data instead of merely listing examples. Adopting this suggestion should provide greater clarity for marketers. Accordingly, the provision now states that marketers need not make this disclosure if they have the required evidence “with respect to the following attributes or properties: durability, luster, density, scratch resistance, tarnish resistance, hypoallergenicity, ability to be resized or repaired, retention of precious metal over time, and any other attribute or property material to consumers.”¹¹¹

¹⁰⁹ The Commission derived this percentage from the comments and PGI’s website. See also supra notes 25 and 88.

¹¹⁰ Instead of comparing attributes to all products containing either at least 85% platinum or at least 50% but less than 85% platinum and at least 95% PGM, platinum/base metal alloys marketers need only compare their products’ attributes to any one traditional platinum product.

¹¹¹ The last phrase, “and any other attribute or property material to consumers,” does not

Third, Karat Platinum contended that the Commission provides insufficient guidance regarding the evidence needed to substantiate that platinum/base metal alloys have the same material attributes as higher purity platinum products. Specifically, Karat Platinum explained that marketers would not know which higher purity platinum products to which they should compare their products. To support this point, Karat Platinum submitted evidence showing that traditional platinum products can differ from each other with respect to scratch resistance and durability.¹¹²

Although the record shows that traditional platinum products can differ from each other with respect to certain attributes, these differences may be insignificant to consumers, and the record does not indicate that consumers have been deceived as a result. If some traditional platinum products differ from each other in immaterial ways, it follows that some platinum/base metal alloys may likewise differ from traditional platinum in immaterial ways. The Commission, therefore, concludes that a platinum/base metal alloy marketer need not make the third disclosure to prevent deception if the material attributes of its product do not differ materially from the attributes of any traditional platinum product.

provide the certainty some commenters may desire, but the surveys never asked consumers which attributes they think are material. Instead, the surveys simply provided a list of attributes and asked consumers to comment. Therefore, the record does not demonstrate that the terms provided are comprehensive. Moreover, over time consumers may find additional attributes material. The uncertainty posed by the catch-all phrase, however, puts platinum marketers in no different position than all other marketers in the economy who must substantiate all their material claims.

¹¹² Karat Platinum cited to PGI data showing that products containing 95% platinum and 5% ruthenium are more durable and scratch resistant than products containing 95% platinum and 5% iridium. The data also showed that both of these products are more durable and scratch resistant than a product containing 100% platinum. Karat Platinum Comment at 2-3.

Fourth, JVC argued that only full disclosure of every materially different attribute would prevent deception because consumers want and expect this information.¹¹³ JVC further contended that it would be impractical for marketers to make such disclosures; and therefore, the Commission should amend the Guides to prevent marketers from using the term “platinum” to describe platinum/base metal alloys. The Commission disagrees. The purpose of the Guides is not to maintain uniformly high product standards, but to prevent unfairness and deception.¹¹⁴ The potential deception here is consumers’ assumption that platinum/base metal alloys are as pure as traditional platinum and/or that they have the same attributes as traditional platinum. A clear and conspicuous disclosure of a product’s composition and that its attributes may differ from those of traditional platinum addresses this potential deception. If consumers are then interested in how this new product differs from traditional platinum products, they can seek further information before purchasing a jewelry product.¹¹⁵

¹¹³ JVC Comment at 10-11.

¹¹⁴ 61 FR 27224, 27225 (May 30, 1996). See also 16 C.F.R. § 1.5.

¹¹⁵ The Commission followed a similar approach in 1997 when it revised the Guides to provide that fully disclosing the content of platinum/PGM products that contain less than 85% platinum would be sufficient to avoid deception. The Commission reasoned that “[a]n informative marking or description will put consumers on notice that the product contains certain precious metals, thereby putting them in a position to inquire of the jeweler as to the relative value of the different metals and the overall value of the product.” 62 FR 16669, 16673 (Apr. 8, 1997). Other Commission Guides and Rules similarly prevent deception by providing that marketers disclose enough information for consumers to make an informed choice or to seek the information needed to do so. See, e.g., Section 260.7(d) of the Guides for the Use of Environmental Marketing Claims (Example 4), 16 CFR § 260.7(d); Section 424.1 of the Retail Food Store Advertising and Marketing Practices Rule, 16 CFR § 424.1.

Fifth, some commenters argued that the substantiation proviso is too subjective, and therefore, unworkable.¹¹⁶ They contended that marketers will differ in their understanding of which attributes are material and the tests they should use to determine differences. They added that no industry-wide, universally-accepted testing methods or standards relating to the attributes of jewelry currently exist.

Neither of these arguments warrants further modifying the proposed proviso. Marketers are responsible for substantiating their claims.¹¹⁷ In this case, the evidence demonstrates that using the term “platinum” to describe a platinum/base metal alloy conveys the claim that the product has the same attributes as traditional platinum. Marketers, therefore, may make disclosures to dispel this claim, avoid the claim altogether, or obtain competent reliable scientific evidence to substantiate the claim. For marketers seeking to avoid the disclosure and still use the term “platinum” to describe their platinum/base metal alloys, the proviso identifies eight material attributes of jewelry based on the consumer perception data in the record. If additional attributes are, or become, material to consumers, marketers are responsible for determining what those attributes are and obtaining the corresponding substantiation.¹¹⁸ This places jewelry sellers in no different a position than any other marketer.¹¹⁹

¹¹⁶ JVC Comment at 5-6, 9; PGI Comment at 4, 17.

¹¹⁷ The law requires marketers to have substantiation for their claims. See Telebrands Corp., 140 F.T.C. 278, 342 (2005), aff’d, 57 F.3d 354 (4th Cir. 2006); FTC Policy Statement Regarding Advertising Substantiation, Appendix to Thompson Medical Co., 104 F.T.C. 648, 839 (1984).

¹¹⁸ The provision does not specify every material attribute or the type of scientific substantiation necessary to avoid making the disclosure, although it does identify material attributes that seem likely to remain material over the long term. Because we may discover that consumers find other attributes material now or in the future, and the nature of the substantiation may change over time, the Commission believes that flexible guidance is appropriate and that

Furthermore, the record shows that tests do exist for determining how some material attributes of jewelry products differ from each other. Indeed, both Karat Platinum and PGI submitted tests showing whether, and to what extent, certain material attributes of various platinum/base metal alloys differ from those of platinum/PGM products. Moreover, marketers need not rely on industry-wide, universally-accepted tests or standards, so long as they have competent and reliable scientific evidence.¹²⁰ Indeed, marketers frequently develop evidence to substantiate their claims even in the absence of industry-wide, universally-accepted tests or standards.¹²¹ The challenges in developing such evidence cited by commenters are not unique to the jewelry industry and do not warrant further modification of the proviso.

Finally, some commenters contended that the third proposed disclosure would present endless possibilities for non-compliance and enforcement would be hopelessly difficult.¹²² The Commission issues guidance to help those marketers who are trying to comply with the law, not for those who are intent on violating it. The Guides themselves, however, are not independently

members of the jewelry industry are well-positioned to comply with such guidance.

¹¹⁹ See *Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982) (finding that an advertiser is responsible for all claims, express and implied, that are reasonably conveyed by the advertisement).

¹²⁰ “Competent and reliable scientific evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. See *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.5; and *Telebrands Corp.*, 140 F.T.C. 278, 347 (2005), aff'd, 57 F.3d 354 (4th Cir. 2006). In the absence of industry-wide, universally accepted tests, marketers can rely on tests conducted and evaluated objectively using procedures generally accepted by professionals in the area.

¹²¹ See, e.g., *Mohawk Petition*, 74 FR 13099, 13102-13103 (Mar. 26, 2009).

¹²² *JVC Comment* at 9, 14; *PGI Comment* at 2, 4, 17-18.

enforceable. Therefore, the Commission would have to bring any enforcement action under Section 5 of the FTC Act and prove that a marketer lacked substantiation for its claims, regardless of what the Guides provided.

D. Commenters' General Objections to the Disclosure Provisions Do Not Justify Further Modification.

The comments filed in 2008 raise four general objections to the proposed amendment, none of which warrant modifications. First, commenters contended that the proposed disclosures are unworkable because: consumers will not read lengthy, technical written disclosures; the average jewelry sales personnel lack the expertise to make oral disclosures effectively; and the disclosures will likely have a chilling effect on sales.¹²³

These objections are not persuasive. With regard to written disclosures, there is no evidence in the record indicating that consumers will not read written disclosures regarding a platinum/base metal alloy's composition and a simple statement that it may differ from traditional platinum. Moreover, the Commission has reduced the size of the proposed disclosures by eliminating the first proposed disclosure, and has simplified the language in the third proposed disclosure. These changes make the disclosures shorter and non-technical, and therefore, easier to comprehend. Additionally, the 2008 Platinum Attitude Study suggests that most consumers can read and understand disclosures regarding the composition of jewelry using the full name and percentage of each metal.

With regard to the inability of sales personnel to make oral disclosures, the record includes the JA email survey showing that 52.5% of the retailers surveyed would find it "difficult" or "very

¹²³ See, e.g., JVC Comment at 12-13; PGI Comment at 15-16, 23; Lowell Kwiat Comment at 1; Tiffany Comment at 4.

difficult” to make the disclosures orally. Sales clerks, however, need not make any disclosure if marketers clearly and conspicuously make the written disclosures provided in the amended Guides. Moreover, simply because making a disclosure is difficult does not mean that it cannot reasonably be done.¹²⁴

With regard to any chilling effect disclosure may have on sales, no commenter has a larger stake in robust sales of platinum/base metal alloy products than Karat Platinum. Yet Karat Platinum, an entity that would be responsible for making the disclosures, indicated that the disclosures are workable and does not object to them. The Commission, therefore, finds this argument unpersuasive.

Second, many commenters objected to the proposed amendment because it conflicts with international standards. As the Commission explained in its 2008 FRN, however, this is not a basis for rejecting the amendment. Although the Commission generally prefers to harmonize its guidance with international laws and standards, Commission Guides must be based upon deception or unfairness.¹²⁵ The commenters base their argument on conflicts between the Commission’s

¹²⁴ Presumably marketers are already accustomed to answering questions about the differences between the jewelry products they sell and competing products. If marketers can explain the difference between jewelry made from platinum/PGM, gold, or platinum/base metal alloys not currently described as platinum, for example, they should be able to explain the differences between platinum/PGM products and platinum/base metal alloys described as platinum. In fact, the JA email survey also showed that 23.1% of the retailers surveyed would find it “easy” or “very easy” to make the disclosures orally (the remaining 24% responded “not sure” or did not answer the question).

¹²⁵ The Trade Agreements Act of 1979 states that no federal agency “may engage in standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States and that federal agencies must, in developing standards take into consideration international standards and shall, if appropriate, base the standards on international standards.” 19 U.S.C. § 2532(2)(A). The term “standard” in the Act includes guidelines that are not mandatory, such as the Jewelry Guides. The Act provides, however, that “the prevention of deceptive practices” is an area where basing a standard on an international standard “may not be

proposed amendment and ISO and CIBJO standards. These standards, however, are technical industry standards developed through a consensus-building process based on a variety of considerations – such as facilitating trade and promoting international cooperation – and not solely upon deception.¹²⁶ Harmonization with international standards is typically favored. Where, as here, however, there is insufficient evidence that a particular claim (i.e., a qualified platinum representation) is deceptive, the Commission cannot promulgate a guide stating that marketers should not make the representation solely to achieve harmony.¹²⁷

Third, some commenters argued that any written disclosure regarding the composition of platinum/base metal alloy jewelry would likely become separated from the jewelry over time.¹²⁸ They contended that, as a result, jewelers could not effectively appraise, resize, or repair the jewelry at a later time. However, the commenters' proposed solution, amending the Guides to state that marketers should not describe platinum/base metal alloys as "platinum," fails to resolve this problem. Specifically, describing such alloys as something other than "platinum" at the time of purchase does not insure that jewelers would have the information necessary to identify, value, resize, or repair the jewelry in the future.

Physically stamping or marking jewelry to indicate its composition would address this concern. The Guides currently do not require stamping, and there is no evidence that such a

appropriate." Id. at § 2532(2)(B)(i)(II).

¹²⁶ See www.iso.org/iso/standards_development/process_and_procedures/how_are_standards_developed.htm. Gaetano Cavalieri Comment at 2.

¹²⁷ Moreover, the current Guides already conflict with ISO and CIBJO standards in that they allow marketers to mark products as platinum, with certain qualifications, even though they contain less than 85% platinum (provided they contain at least 50% platinum and 95% PGM).

¹²⁸ See, e.g., JVC Comment at 13.

requirement is necessary in this case. In fact, Karat Platinum already marks its products with composition information.¹²⁹ However, the Commission amends Section 23.7(c) of the Guides to clarify that marketers may mark or stamp platinum/base metal alloy jewelry accurately to indicate composition using parts per thousand and standard chemical abbreviations (e.g., 585 Pt., 415 Co.) without triggering the new disclosure. This amendment should insure that marketers are not deterred from marking their products based upon the Commission's new platinum guidance. The Commission proposed this amendment in its 2008 FRN, and no commenter specifically objected. If actual deception occurs based on the lack of marking, or the lack of further disclosure, the Commission may consider amending the Guides at a later date.

Finally, although Karat Platinum supported the Commission's general approach, it argued that the Commission should level the playing field by amending the Guides to provide that marketers of both platinum/base metal alloys and platinum/PGM products make the same composition and attribute disclosures detailed above. Karat Platinum argued that consumers do not understand the chemical abbreviations used to describe platinum/PGM products containing less than 95% platinum any better than they understand the chemical abbreviations used to describe the content of platinum/base metal alloys. It also argued that platinum/PGM products differ from each other with respect to material attributes such as durability and scratch resistance.

The record suggests that marketers of at least some products consisting of at least 50% but less than 85% platinum and at least 95% PGM may need to make additional disclosures when describing their products as "platinum" to avoid deception; however, further evidence is needed. The attributes of these products may vary depending upon the combination of metals used. We

¹²⁹ Karat Platinum Comment 2005 at 2.

have no evidence whether these differences are material to consumers. Absent such evidence we decline to amend the Guides to provide for additional disclosures. Marketers of these products must ensure that they are not making deceptive statements about their products based on reasonable consumer perception.

We, therefore, conclude that the disclosures, described above, are the best option for addressing deception regarding the attributes of platinum/base metal alloys described as “platinum.”

E. The Record Is Insufficient to Warrant Amending the Guides to Address the Marketing of Products Containing Platinum Plating or Coatings.

Several comments proposed that the Commission provide detailed guidance regarding the marketing of products containing platinum plating or coating. The JVC comment, for example, proposed addressing a number of issues relating to the marketing of such products, including the platinum content and thickness of platinum plating, washing or flashing, and heavy plating. The record, however, does not include any evidence regarding how consumers perceive products with platinum plating or coating or the claims made for them. Nor does the record include any evidence showing how the industry proposal would address any problem that may exist, or how consumers would perceive the disclosures contemplated by the proposal. Accordingly, the Commission declines to amend the Guides to address the marketing of products with platinum plating or coatings at this time.¹³⁰

List of Subjects in 16 CFR Part 23

Advertising, Jewelry, Labeling, Pewter, Precious metals, and Trade practices.

¹³⁰ The Commission agrees with Karat Platinum that one provision in the amendments adopted herein belongs in Section 23.7(c) rather than 23.7(b). Accordingly, the Commission decided to add this provision to Section 23.7(c) and revise it in a non-substantive manner so that the wording is consistent with the other parts of Section 23.7(c).

For the reasons set forth in the preamble, the Federal Trade Commission amends 16 CFR Part 23 as follows:

PART 23-GUIDES FOR THE JEWELRY, PRECIOUS METALS, AND PEWTER INDUSTRIES

1. The authority citation for part 23 is revised to read as follows:

Authority: 15 U.S.C. 45, 46.

2. Amend § 23.0 to add paragraph (d) and paragraph (e) to read as follows:

(d) These guides set forth the Federal Trade Commission's current thinking about claims for jewelry and other articles made from precious metals and pewter. The guides help marketers and other industry members avoid making claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. They do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, may take action under the FTC Act if a marketer or other industry member makes a claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.

(e) The guides consist of general principles, specific guidance on the use of particular claims for industry products, and examples. Claims may raise issues that are addressed by more than one example and in more than one section of the guides. The examples provide the Commission's views on how reasonable consumers likely interpret certain claims. Industry members may use an alternative approach if the approach satisfies the requirements of Section 5 of the FTC Act. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue. In addition, although many examples

present specific claims and options for qualifying claims, the examples do not illustrate all permissible claims or qualifications under Section 5 of the FTC Act.

3. Amend § 23.7(b) to add paragraph (4) and note to paragraph (4) to read as follows:

(4) Use of the word “Platinum,” or any abbreviation accompanied by a number or percentage indicating the parts per thousand of pure Platinum contained in the product, to describe all or part of an industry product that contains at least 500 parts per thousand, but less than 850 parts per thousand, pure Platinum, and does not contain at least 950 parts per thousand PGM (for example, “585 Plat.”) without a clear and conspicuous disclosure, immediately following the name or description of such product:

(i) of the full composition of the product (by name and not abbreviation) and percentage of each metal; and

(ii) that the product may not have the same attributes or properties as traditional platinum products.

Provided, however, that the marketer need not make disclosure 23.7(b)(4)(ii), above, if the marketer has competent and reliable scientific evidence that such product does not differ materially from any one product containing at least 850 parts per thousand pure Platinum with respect to the following attributes or properties: durability, luster, density, scratch resistance, tarnish resistance, hypoallergenicity, ability to be resized or repaired, retention of precious metal over time, and any other attribute or property material to consumers.

Note: When using percentages to qualify platinum representations, marketers should convert the amount in parts per thousand to a percentage that is accurate to the first decimal place (e.g., 58.5% Platinum, 41.5% Cobalt).

4. Amend § 23.7(c) to add paragraph (5) to read as follows:

(5) An industry product consisting of at least 500 parts per thousand, but less than 850 parts per thousand, pure Platinum, and not consisting of at least 950 parts per thousand PGM, may be marked or stamped accurately, with a quality marking on the article, using parts per thousand and standard chemical abbreviations (e.g., 585 Pt., 415 Co.).

By direction of the Commission.

Donald S. Clark
Secretary.